IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.527 OF 2004

IN

SUIT NO.530 OF 2004

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Michael Edrich DeSa ...Plaintiff

v/s.

Thelma Purification D'souza

and another ...Defendants

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Mr.Z.Andhyarujinha i/b Maneksha Sethna for the Plaintiff.

Mr.O.J.Menezes for Defendants Nos. 1 & 2.

Mr.S.Vesudeo for Defendant No.4.

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CORAM: D.K.DESHMUKH, J.

DATED: 17th December,2004

P.C.:

1. This Notice of Motion is taken out by the Plaintiff. This Notice of Motion was heard at ad-interim stage at length and a detailed order has been passed on 21st April, 2004 declining any ad-interim relief to the Plaintiff. At the final hearing of the motion, substantially the same arguments were advanced. After having heard the learned Counsel for both sides and after having gone through the record and the order dated 21st April, 2004 passed in this Notice of Motion, I find myself in complete agreement with the reasons recorded by the learned Judge for holding that the Plaintiff has failed to make out a prima facie case, and therefore, I do not propose to repeat the facts which have been narrated in detail in the order dated 21st April, 2004. I propose to deal with only some additional submissions made on behalf of the Plaintiff.

2. It was contended by the learned Counsel appearing for the Plaintiff that according to Will of the

deceased , the present occupants of the property were to hand over vacant possession to the prospective purchasers against the suitable alternate accommodation and not accommodation on the same property. It was submitted that because the executrix is one of the occupants, she insisted on accommodation being provided by the purchaser on the same plot and that insistence of the executrix is contrary to the stipulation in the Will. In my opinion, this submission has no substance, because the Will contemplates the occupants vacating the premises presently occupied by them against suitable alternate accommodation. What is suitable alternate accommodation is obviously to be decided by the occupants and the purchaser. It is further to be seen here that even this insistence of the executrix has not resulted in drastic undervaluation of the property, because what was offered by the Plaintiff for the property was Rs.2,17,00,000/-, whereas now the property is being sold for Rs.2,10,00,000/-. Some sort of malice or lack of bonafides could possibly have been attracted to the executrix, had there been a drastic difference in which the price for the property now being sold and that the price that the Plaintiff was willing to offer. It is

further to be seen here that from the recital in the Will it is clear that the deceased had love and affection for the executrix. She was given her total share in the property. Power to dispose of the property also was given to her and the desire that the executrix should be provided suitable alternate accommodation is also expressed by the deceased in the Will. In my opinion, therefore, insistence of the executrix that the occupants should be given accommodation on the same plot where they have been living all along, in my opinion, cannot be said to be contrary to the stipulation in the Will. It was also urged before me that though it appears that by the agreement in question the property is being sold, though the agreement is described as "Development Agreement", and because it is the development-cum-sell agreement, the purchaser is making payment in installment, with the result the sharers like the Plaintiff will get his share of the purchase price belated. It was submitted that had the property being sold outright, the Plaintiff would have received his 1/5th share of the sale-proceeds immediately.

3. The contention that the Plaintiff is entitled to 1/5th share was strongly opposed by the Defendants. According to the Defendants, the father of the Plaintiff was entitled to 1/5th share, but now the father of the Plaintiff died leaving behind him other heirs also. In my opinion, it is not necessary to go into the controversy whether the Plaintiff is entitled to 1/5th share of the sale-proceeds or not. I also find some substance in the contentions urged on behalf of the Plaintiff that had there been out right sale the Plaintiff would have received his share of purchase money immediately. Therefore, in my opinion, it would be in the interest of justice to direct the developer/Defendant No.4 to deposit in this Court 1/5th of the purchase price agreed to be paid by the development agreement for the property. On the amount being deposited, the Prothonotary & Sr.Master shall invest that amount in fixed deposit in a nationalised bank. The learned Counsel appearing for the Defendant No.4 stated that the Defendant No.4 should be given eight weeks time to make the deposit. The Defendant No.4 is, therefore, directed to deposit the amount within the period of eight weeks from today. The question of entitlement of the Plaintiff to 1/5th share or otherwise is not

an issue in this suit. Therefore, in case that issue is resolved in some other proceedings or if any other development takes place, the Defendant No.4 as also the Plaintiff shall be entitled to make application to the court for appropriate order in relation to the amount directed to be deposited by this order. Notice of Motion disposed of.

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